

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
MONTGOMERY COUNTY, MARYLAND
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**SPECIAL EXCEPTION OF THOMAS AND CLETA TOOMEY
CASE NO. S.E. 89-11**

ORDER OF REVOCATION

Background

Special Exception 89-11 was granted to Petitioners Thomas and Cleta Toomey by the Hearing Examiner, on December 22, 1989, to permit the operation of a Child Day Care of 13 to 30 children, at 130 Central Avenue, Gaithersburg, Maryland. Exhibit 3. According to records of the Department of Permitting Services (DPS), the property formerly known as 130 Central Avenue, Gaithersburg, is now identified as 8740 Oakmont Street., Gaithersburg, Maryland (Exhibit 4). SDAT property records (Exhibit 1(a)) identify the owners of the property as Aziz Tahira and Nadia Dodd. For the reasons outlined below, this order will revoke the special exception in accordance with the recommendation of the Department of Permitting Services.

On March 20, 2017, Jennyffer Vargas, DPS Permitting and Code Enforcement Inspector, sent a memorandum (Exhibit 1)¹ to the Board of Appeals referring the above-captioned case for revocation. On April 12, 2017, the Board of Appeals forwarded the matter to the Office of Zoning and Administrative Hearings (OZAH) for action (Exhibits 2).

Ms. Vargas of DPS based the revocation request on the following assertions:

1. The daycare is currently licensed for up to 12 children, and the special exception is in the R-200 Zone, which allows daycare of up to 12 children as a limited use (*i.e.*, without a special exception (Exhibit 1)); and
2. The owner of the subject property, Nadia Dodd, who according to Ms. Vargas is the daughter of the special exception holder, seeks to abandon the special exception. Exhibits 1 and 1(b).

Ms. Dodd's email response of August 4, 2016 (Exhibit 1(b)) is unambiguous:

Hi Jennyffer,
Yes, please abandon the Special Exception.
Thank you,
Nadia Dodd

Ms. Vargas does not document whether Ms. Dodd's mother is actually the original special exception holder, Cleta Toomey, but it appears that the child care use, which was the subject of SE 89-11, is operating at the Oakmont Street site, which is owned by Ms. Dodd.

¹ The file in this ancient case could not be located in OZAH's records. Therefore, a new file was established to contain the revocation documents, and the Exhibit List references only the new exhibits regarding revocation.

Based on this evidence, and Ms. Vargas's email exchanges with OZAH from April 12, 2017 through June 16, 2017 (Exhibit 4), the Hearing Examiner finds that the owner of the property currently housing the special exception use, seeks to have the special exception revoked as abandoned. Given these facts, revocation of the special exception, based on abandonment, appears appropriate.

Opinion

Pursuant to Section 7.7.1.B.1. of the 2014 Zoning Ordinance, special exceptions approved before October 30, 2014 must be reviewed under the standards of the Zoning Ordinance in effect on October 29, 2014 (*i.e.*, under the old, 2004 Zoning Ordinance). Since the subject special exception clearly falls into that category, it will be reviewed under the old Ordinance.

Section 59-G-1.3(d) of the old Zoning Ordinance provides, in relevant part:

- (1) If, after making an inspection of a property governed by special exception, the Department finds that the special exception use as granted has been abandoned, it must forward written notice of its findings to the last recorded holder of the special exception and to the property owner, advising of the Department's finding and directing that they forward to the Department, within 60 days from the date of mailing of the notice, a written statement confirming the Department's finding that the special exception has been abandoned or challenging said finding and requesting that said special exception be continued.*
- (2) If the Department receives a written response from the special exception holder and the property owner acknowledges that the special exception has been abandoned, the Department must notify the Board of its findings, and the Board², upon receipt of such notice, must adopt and issue a written resolution finding the special exception to have been abandoned and ordering the special exception revoked.*
- (3) If within the provided 60-day period, the Department receives a written statement from either the special exception holder or the property owner challenging the Department's findings and requesting that the special exception be continued, the Department must notify the Board, and the Board must convene a public hearing, in accordance with the provisions of subsection (e) of this section, to determine whether or not the special exception was abandoned and whether or not the special exception should be revoked.*
- (4) If after 60 days from the date of mailing of the Department's notice, the Department has received no response from either the special exception holder or the property owner, the Department must notify the Board of its findings, and the Board must issue to the special exception holder and the property owner an order to appear before the Board to show cause why the special exception should not be revoked.*

² Although this section refers to the "Board," meaning the Board of Appeals, the Hearing Examiner is authorized by Section 59-G-1.3(f) of the old Zoning Ordinance to conduct the same proceedings with regard to special exceptions, such as this one, that it has issued.

(5) If neither the special exception holder nor the property owner appears before the Board to show cause why the special exception should not be revoked, the Board must adopt and issue a resolution finding the special exception to have been abandoned and ordering the special exception revoked. . . .

As detailed above, the current property owner has confirmed that the special exception has been abandoned. No response has been received from the original special exception holder, and DPS has been unable to locate the original special exception holder.

Under the statutory terms quoted above, if DPS receives a written response from both the special exception holder and the property owner acknowledging that the special exception has been abandoned, the Hearing Examiner must find the special exception to have been abandoned and order the special exception revoked. The Code further provides that if the Department has received no response from either the special exception holder or the property owner, a show cause hearing is required to determine whether the special exception should be revoked. The statutory language does not seem to cover a situation, like this one, where a response confirming abandonment has been received from the property owner, but no response has been received from a special exception holder who can no longer be located.

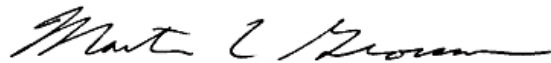
The Hearing Examiner concludes that it would be pointless to issue a notice and schedule a show cause hearing when the indisputable facts clearly establish that the owner of the subject property seeks to have the special exception revoked as abandoned.

The Department of Permitting Services has met its obligations under Section 59-G-1.3(d)(2), and a reasonable reading of that section now requires the Hearing Examiner to issue a finding that the special exception has been abandoned and order the special exception revoked.

Order

Based on this record, the Hearing Examiner hereby finds that the special exception granted in the above-captioned case has been abandoned. Accordingly, pursuant to Sections 59-G-1.3(d) and 59-G-1.3(f) of the 2004 Zoning Ordinance, Special Exception No. S.E. 89-11 is hereby **REVOKED**.

Dated: June 19, 2017



Martin L. Grossman
Director and Hearing Examiner
Office of Zoning and Administrative Hearings

cc: Nadia Dodd
Jennyffer Vargas, Department of Permitting Services
Planning Department
Board of Appeals